

Patents and the Government Contractor

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Article one, section 8, clause 8 of the United States Constitution states:

The Congress shall have power...to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

These words, largely unknown but to IP attorneys and constitutional scholars, form the basis for patent protection in the United States. Anyone who has owned a home or a plot of land has a sense of meaning of property. To own a piece of land gives one, within certain limits, dominion over that land. If someone trespasses they may be subject to certain penalties. Property of that nature is a relatively easy concept to understand and from a legal perspective the laws governing rights over real property have evolved over some 200-300 years. So the idea of "what happens when someone steps over my fence" is firmly established.

Four Types...for (Various) Types

Patents are a form of intellectual property. IP, or property of the mind, is sometimes difficult to grasp. It is intangible and, unlike a deed for a parcel of land, there are no clear metes and bounds. And the application for property law on new technology continues to evolve. There are four types of intellectual property; patents, copyrights, trademarks and trade secrets. Each protects a different aspect of intellectual property; copyrights — original expressions, trademarks —good will and reputation, trade secrets —non-public valuable information and patents —inventions. The "ownership" of an invention or an idea does not come easy, but when a patent is granted that captures an invention and that idea is the basis by which a product is desirable and successful, the patent is indeed valuable. Patents are the lifeblood of commercial innovative companies.

And, as author Mark Blaxill so adeptly writes in his book, *The Invisible Edge: Taking Your Strategy to the Next Level Using Intellectual Property*, "Innovation without protection is philanthropy." So, it comes as no

surprise that innovative companies invest substantially in protecting their inventions, original works and secrets.

Enhancing Your Competitive Advantage

Every year millions of dollars are spent by the government in research and development. The clear majority of that research is conducted by private companies under contract with the US government. How the Government engages individuals and companies to conduct research is beyond the scope of this small article but suffice to say they are broad and diverse.

And in each, by virtue of some very special laws, the contractor generally owns the intellectual property, not the government. Yet patent filings by companies who are primarily government contractors are at substantially lower rates than companies that are commercially focused. Why?

The typical answer is to point to out that the government gains broad rights to any invention conceived or first reduced to practice under and/or funded by a government contract. Patents are a means by which to enhance a company's competitive advantage. If your single customer already has a license, where is the advantage? Such a response fails to consider technology developed for government use may have other commercial applications.

Dollars from Uncle Sam are Everywhere

Technology developed through government funding is pervasive in everyday life. From GPS to Siri to Google to the Internet. Each started with government funding and some insight that a government-sponsored project with seemingly narrow applications directed toward governmental interests may indeed have other, commercial applications. Patents were drafted that covered both applications, and while the government rights to use the invention remains, companies can thrive on commercial opportunities. Remember, innovation without protection is philanthropy.



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